United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

77-2007

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DANIEL WHITE,

Appellant,

-against-

EUGENE S. LEFEVRE, Superintendant of Clinton Correctional Facility,

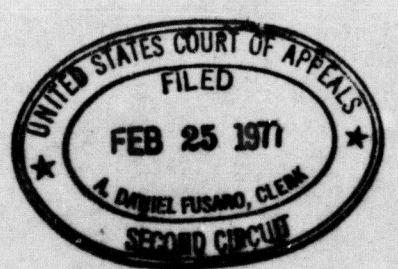
Appellee.

Docket No. 77-2007

B
P/S

APPENDIX FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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PLAINTIFFS

~~WHITE, DANIEL, U.S.A. ex rel.~~
WHITE, DANIEL

DEFENDANTS

LAVALLEE, J. EDWIN, Supt.
Clinton Correctional Facility

A

CAUSE

F.L.

WRIT OF HABEAS CORPUS
28 USC 2254

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UNITED STATES COURT OF APPEALS
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JAN 21 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

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				JS-6	✓

DATE	NR.	PROCEEDINGS
01-07-76	1	Filed petition for writ of habeas corpus.
01-07-76	2	Filed order granting petitioner to proceed in forma pauperis, Ward, J.
02-03-76	3	Filed affdvt. and order extending respondent's time to answer petitioner's application for writ of habeas corpus to 2/25/76.-- Palmieri, J.
03-05-76	4	Filed notice of assignment to Carter, J.
3-15-76		Fld Order that deft's time to file his opposition topetitioner appl. for writ H/C is ext to 3-24-76....Carter,J.(pro se ck to mn)
3-26-76		Fld NYS's Affdvt in opposition to petition 's application for writ of H/C.
4-2-76		Fld Pltff's Affdvt in Traverse.
10-15-76		Fld Opinion#45251.....Peitioner's application for a writi of H/C is denied..It is so ORdered.d.....Carter,J. mn/copy
12-2-76		Fld Endorsement on Notice of Appeal....Petitioner's req for leave to proceed on appeal in forma pauperis and for a certificate of prob. Cause is granted..It is so Ordered.....Carter,J. m/copy
12-17-76		Fl Peitioner's Notice of Appeal to USCA from order ent. 10-15-76. mn to Atty Gen's Office State of NY 2 World trade Center NYC

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RAYMOND F. BURGHARDT, Clerk
By [signature] Deputy Clerk

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U.S. DISTRICT COURT
FILED
OCT 15 1976
8:43 a.m.
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
ex rel. DANIEL WHITE,

Petitioner,

-against-

J.E. LaVALLEE, Superintendent,
Clinton Correctional Facility,

Respondent.

76 Civ. 42
Pro Se

#45251

B

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by Joan P. Scannell
Deputy Assistant Attorney General

CARTER, District Judge

4

O P I N I O N

Petitioner White, a state prisoner, seeks habeas corpus relief pursuant to 28 U.S.C. §2254 on the grounds that he was denied effective assistance of counsel. The petition is denied.

Facts

On November 30, 1970, petitioner was convicted of the crime of murder in the first degree after a jury trial held in Supreme Court, New York County. Petitioner was sentenced to a term of 20 years to life imprisonment. The conviction was affirmed by the Appellate Division, First Department, People v. White, 39 A.D. 2d 1018 (1972), and leave to appeal to the New York Court of Appeals was denied.

Petitioner applied for a writ of habeas corpus in the United States District Court for the Southern District of New York (73 Civ. 4688) on grounds similar to those raised here. On March 28, 1974, Judge Brieant dismissed the application for failure to exhaust available state remedies. Thereafter, petitioner instituted two writs of error coram nobis in the state courts, both of which were denied. The denial of the second application was affirmed by the Appellate Division, Third Department, on April 24, 1975. Having thereby exhausted his available state remedies, plaintiff renews

BOORUM & PEASE "NOREAR" ®

his application for habeas corpus relief.

Discussion

I

Petitioner's only claim is that he was denied the effective assistance of counsel, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. In particular, he asserts that his counsel sought the postponement of a Huntley hearing scheduled for October 22, 1970, on the grounds of ill health, and that such application was denied by the court.

On October 20, 1970, at a pre-trial conference, petitioner's counsel complained to the trial judge that he had broken several teeth, that he had been heavily medicated and was "doped up" and unable to stand on his feet. The trial judge adjourned the hearing until October 22nd. The record reveals that on that date petitioner's counsel again complained to the trial judge that he was experiencing severe dental problems which had caused, and was causing him extreme pain; that he had barely eaten or slept for almost a week; that an ulcerous condition had become aggravated as a result; and that he was "living on Darvon and asprin." Counsel strenuously argued that he was physically unable to go to trial. Upon questioning

by the trial judge, petitioner's counsel indicated that he had been both at work and at court for a portion of the previous day. As noted, the trial judge refused counsel's application for an adjournment. 1/

II

In United States v. Yanishefsky, 500 F. 2d 1327, 1333 (2d Cir. 1974), the standard for evaluating claims of ineffective assistance of counsel was enunciated as follows:

> "The current standard of ineffective assistance of counsel in this circuit is that in order to be of constitutional dimensions the representation be so "woefully inadequate 'as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.'" United States v. Currier, 405 F. 2d 1039, 1043 (2d Cir.), cert. denied, 395 U.S. 914, 89 S.Ct. 1761, 23 L.Ed. 2d 228 (1969), quoting United States v. Wight, 176 F. 2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950, 70 S.Ct. 478, 94 L.Ed. 586 (1950)."

1/ The Court stated:

"It would appear to me, Mr. Steinberg, from my observation of your appearance this morning in court, that your physical condition will not incapacitate your ability to represent this defendant. Your condition is apparently not one that has been brought upon you suddenly; and in the absence of any medical evidence that you are incapable of proceeding with this trial, I will deny your application for an adjournment of this case on that ground." (Transcript, October 22, 1970, at p. 15). It is worth noting that by the conclusion of the Huntley hearing in the afternoon of October 22, petitioner's counsel indicated to the court that "I happen to be feeling fairly good now, and I am not complaining on that issue." (Transcript, October 22, 1970, at p.94).

Errorless counsel is not required; rather, in order to overturn a conviction, counsel's performance must be so "'horribly inept' as to amount to 'a breach of his legal duty faithfully to represent his client's interests'", United States ex rel. Scott v. Mancusi, 429 F. 2d 104, 109 (2d Cir. 1970), cert. denied, 402 U.S. 909 (1971), quoting from United States ex rel. Maselli v. Reincke, 383 F. 2d 129, 132 (2d Cir. 1967), or amount to a "total failure to present the cause of the accused in any fundamental respect", United States v. Garguilo, 324 F. 2d 795, 796 (2d Cir. 1963), quoting from Brubaker v. Dickson, 310 F. 2d 30, 39 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963). See also, United States ex rel. Johnson v. Vincent, 507 F. 2d 1309, 1312n.7 (2d Cir. 1974), cert. denied, 420 U.S. 994 (1975); United States ex rel. Walker v. Henderson, 492 F. 2d 1311, 1312 (2d Cir. 1974); United States v. Maxey, 498 F. 2d 474 , 483 (2d Cir. 1974); United States v. Sanchez, 483 F. 2d 1052, 1057 (2d Cir. 1973); United States v. Sangemino, 401 F. Supp. 903, 910 (S.D.N.Y. 1975).

The performance of petitioner's counsel at the Huntley hearing held on October 22, 1970, despite his physical ailments, did not even begin to approximate the level of incompetence which must be

demonstrated in order to overturn petitioner's conviction. The trial judge found that counsel was able to proceed with the Huntley hearing and, despite his vigorous protestations, counsel carried out his adversarial tasks. The record amply demonstrates counsel's vigorous and often lengthy cross-examination of prosecution witnesses and frequent objections and exceptions to the court's rulings. Petitioner is unable to point to any specific instance in which he was prejudiced by counsel's alleged ineffective advocacy.

I have carefully reviewed the entire record in this case, and find that petitioner's claims with respect to ineffective assistance of counsel, even when construed liberally as required by Haines v. Kerner, 404 U.S. 519 (1972), are wholly lacking in merit.

Accordingly, petitioner's application for a writ of habeas corpus is denied.

IT IS SO ORDERED.

Dated: New York, New York
October 13, 1976

Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

CERTIFICATE OF SERVICE

Feb. 25 (prom-), 1977

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Peggy St. Bar